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In the Supreme Court of the United States

ROGER REEVES, PETITIONER

v.

SANDERSON PLUMBING PRODUCTS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether prima facie proof of age discrimination, coupled with evidence sufficient to support a finding that the employer has not offered its true reason for an adverse employment action, is sufficient to sustain a jury verdict of intentional discrimination in violation of the Age Discrimination in Employment Act.

2. Whether, in passing on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, a court considers all of the evidence or only the evidence favorable to the party against whom judgment is sought.

3. Whether the standard for granting judgment as a matter of law under Rule 50 is the same as the standard for granting summary judgment under Federal Rule of Civil Procedure 56.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Summary of argument	8
Argument:	
The court of appeals erred in awarding judgment as a matter of law to respondent because the evidence was sufficient to sustain the jury's verdict that respondent fired petitioner in violation of the ADEA	10
A. Prima facie proof of discrimination, together with evidence that the employer has not offered its true reason for an adverse employment action, is usually sufficient to support a jury finding of discrimination	11
B. Petitioner's prima facie case, coupled with his evidence that respondent did not offer the true reason for firing him, was sufficient to support the jury's verdict, despite the contrary evidence on which the court of appeals relied	24
Conclusion	30

TABLE OF CONTENTS

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	23
Anderson v. *Bessemer City*, 470 U.S. 564 (1985)	23, 28
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	22, 23, 24, 30
Brady v. *Southern Ry.*, 320 U.S. 476 (1943)	22
Castaneda v. *Partida*, 430 U.S. 482 (1977)	29
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	22, 23
Furnco Const. Corp. v. *Waters*, 438 U.S. 567 (1978)	11, 14, 16, 25, 29

Cases—Continued: Page

Graves v. *United States*, 150 U.S. 118 (1893) 19
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 11, 12
Jackson v. *Virginia*, 443 U.S. 307 (1979) 23
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 23
Lorillard v. *Pons*, 434 U.S. 575 (1978) 12
Lytle v. *Household Mfg., Inc.*, 494 U.S. 545 (1990) 22
MacDissi v. *Valmont Indus., Inc.*, 856 F.2d 1054 (8th Cir. 1988) 18
Matsushita Elec. Indus. Co., Ltd. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 23
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8, 11, 12, 13, 14, 17
McKennon v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) 10, 12
O'Connor v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) 1, 12, 15
Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 29
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 13
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 20, 29, 30
Rothmeier v. *Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996) 21
St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502 (1993) ..... *passim*
Teamsters v. *United States*, 431 U.S. 324 (1977) ... 12, 16, 20
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 12, 13, 14, 16, 17
United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 11, 13, 20, 29
Webb v. *Illinois Cent. R.R.*, 352 U.S. 512 (1957) 22
Wilkerson v. *McCarthy*, 336 U.S. 53 (1949) 22, 23
Wright v. *West*, 505 U.S. 277 (1992) 19

Statutes and rules: Page

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 10
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 1
29 U.S.C. 623(a)(1) 10
29 U.S.C. 631(a) 10
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 10
Equal Pay Act of 1963, 29 U.S.C. 206(d) 10
National Labor Relations Act, 29 U.S.C. 158(a) 10
Fed. R. Civ. P.:
Rule 50 ..... 22, 23
Advisory Committee's Note (1991 Amendments) .. 23, 24
Rule 52(a) 23
Rule 56 23
Fed. R. Crim. P. 29 23
Fed. R. Evid. 301 ..... 17, 18

Miscellaneous:

Marc Bendick, Jr. et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10(4) J. Aging & Soc. Pol'y 5 (1999) 10-11
Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903 (1971) 23, 24
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EEOC: Enforcement Guidance on St. Mary's Honor Center *v.* Hicks, 8 Fair Empl. Prac. Man. (BNA) 405:7175 (Apr. 12, 1994) 21
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H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. (1974) 17
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Miscellaneous—Continued: Page

Leonard B. Sand et al., *Modern Federal Jury Instructions* (1999):
Vol. 1 19
Vol. 5 18-19
2 John H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1979) 19
Charles A. Wright et al., *Federal Practice and Procedure* (1977):
Vol. 9A 22, 23, 24
Vol. 21 ..... 17, 18

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISION

This case concerns the amount and nature of proof required to sustain a jury's finding of age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) has responsibility for interpreting and enforcing the ADEA, which prohibits discrimination in employment on the basis of age. The courts have applied the same standards of proof under the ADEA as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310-311 (1996). The Attorney General and the EEOC share responsibility for enforcing Title VII, which prohibits employment discrimination on the basis of race, sex, religion, or national origin. The resolution of this case will affect the discharge by the Attorney

General and the EEOC of their responsibilities under those statutes.

STATEMENT

1. Petitioner Roger Reeves worked for respondent Sanderson Plumbing Products, a manufacturer of toilet seats and covers, for 40 years. Pet. App. 2a. In October 1995, respondent fired petitioner from his job as a supervisor in the Hinge Room. Petitioner was 57 years old. On three successive occasions over the next two years, respondent filled petitioner's former position with men in their thirties. *Id.* at 2a-3a.

The Hinge Room included a "regular line," supervised by petitioner, and a "special line," supervised by Joe Oswalt, a man in his thirties. Russell Caldwell, age 45, was manager of the Hinge Room and supervised both petitioner and Oswalt. As part of his duties, petitioner was required to keep daily attendance and tardiness records for the workers he supervised. Pet. App. 2a.

In late 1993, respondent's Department of Quality Control, under the direction of Powe Chesnut, conducted an efficiency study of Hinge Room operations. Pet. App. 2a. Chesnut had married company president Sandra Sanderson in 1988. *Id.* at 3a n.1. According to Oswalt, Chesnut was "in absolute power" at the plant for "as long as [he] could remember." 3 R. 80. Chesnut's efficiency study identified "productivity problems" on the regular line "stemming from a lax assembly line operation." Pet. App. 2a-3a. Consequently, at Chesnut's recommendation, petitioner was placed on a 90-day probation for unsatisfactory performance. *Ibid.*[1]

[1] At trial, Chesnut initially testified that he "made no instructions, no recommendation" that petitioner be placed on probation following the 1993 efficiency study. 4 R. 199. When confronted with his signed affidavit on cross-examination, however, Chesnut acknowledged that he had in fact recommended petitioner for probation in 1993. *Id.* at 237.

Company records showed that, during 1993, petitioner's productivity was comparable to that of Oswalt, the younger supervisor of the special line. See 3 R. 163-167; 4 R. 226. Yet only the regular line, supervised by petitioner, was subjected to an efficiency study, and only petitioner was placed on probation. 3 R. 166-167; 4 R. 228-229. After the probationary period, petitioner's productivity increased, and he was awarded a merit pay raise. 3 R. 103, 113.

By 1995, Chesnut had been promoted to Director of Manufacturing. Pet. App. 3a. Hinge Room manager Caldwell told Chesnut that the department was having trouble meeting production requirements due to "pervasive absenteeism and tardiness." *Ibid.* In the fall of 1995, Chesnut ordered an audit of the time records of Hinge Room employees for the months of July, August, and September. 4 R. 204-205. According to respondent, the audit disclosed "numerous timekeeping errors and misrepresentations" by Caldwell, Oswalt, and petitioner. Pet. App. 3a. Based on the audit results, Chesnut, Dana Jester, Vice President of Human Resources, and Tom Whitaker, Vice President of Operations, recommended that Caldwell and petitioner be discharged. Company President Sanderson followed the recommendation and fired both petitioner and Caldwell in October 1995. *Ibid.* Oswalt had left his job voluntarily on August 1, before the audit was conducted. 3 R. 79. Chesnut testified that, had Oswalt still been with the company, he would also have been discharged. Pet. App. 3a n.3.

Petitioner sued respondent in 1996, claiming that he was discharged because of age in violation of the ADEA. Petitioner testified at trial that, on the day he was fired, Chesnut told him that he was being dismissed because of a timekeeping error involving a single employee, Genie Mae Coley, who was paid for two days in September 1995 when she was absent from work. 3 R. 23. Petitioner demonstrated at trial, however, that he was in the hospital on the two days for which Coley was allegedly overpaid and that Caldwell was responsible for any error in Coley's time sheets. *Id.* at 17.

At trial, respondent asserted that petitioner was fired because of his "shoddy record keeping" in documenting the attendance and hours of employees under his supervision. Pet. App. 7a. According to respondent, petitioner's errors resulted in payments to employees for time they had not worked and failure to discipline employees who were absent or tardy. *Ibid.* Respondent maintained that the alleged errors in petitioner's record keeping exposed the company to the risk of union grievances or charges of unfair labor practices for inconsistent disciplinary actions. 3 R. 154. Chesnut acknowledged, however, that the company had never received a single union grievance or employee complaint arising from petitioner's timekeeping practices. 4 R. 267. Nor did respondent ever calculate the amount of any overpayment to employees resulting from alleged errors in petitioner's record keeping. *Id.* at 301.

Petitioner challenged the veracity of respondent's assertion that his record keeping was inaccurate. Pet. App. 8a. The vast majority of the errors attributed to petitioner arose from his failure to record as "late" employees who, according to the daily timesheet, had arrived at 7 a.m. for a 7 a.m. shift. 3 R. 118-123; 4 R.

241-245. Sanderson maintained that employees who clocked in at 7 a.m. could not be at their work stations as required for the start of the 7 a.m. shift, and therefore they should have been coded as "late" on the weekly timesheet. 3 R. 119-120.

Both petitioner and Oswalt testified, however, that respondent's automated time clock often failed to scan the "bar codes" on employees' time cards, in which case the initial daily timesheet would not reflect an arrival time. 3 R. 18-20, 84-85; 4 R. 335. Each supervisor was therefore required to record attendance manually by visually checking whether each employee was at his or her work station at the start of the 7 a.m. shift. 4 R. 335. When the daily time sheet failed to show that an employee had clocked in, but the supervisor had manually recorded that the employee was at his or her work station at the start of the shift, the supervisor would reconcile the records by writing in a 7 a.m. arrival time for the employee on the time sheet. 3 R. 18-20, 84-85; 4 R. 335. In those circumstances, even when an employee had actually arrived at work before 7 a.m., his time of arrival was recorded on the timesheet as 7 a.m. *Ibid.*

Chesnut confirmed that "there were times the bar code" on employees' time cards "wouldn't work," and, on those occasions, if "people were there at their work station[s]" at the start of the shift, the supervisors "would write in seven o'clock," and "[t]hat would show in the time card." 4 R. 243-244. Both Chesnut and Sanderson also acknowledged that employees who clocked in before 7 a.m. were treated as arriving at 7 a.m. for purposes of computing their pay. 3 R. 124-125; 4 R. 263.

Petitioner testified that he checked whether his employees arrived on time and assigned extra work to

any employee who was paid for arriving early or staying late. See Pet. App. 8a. According to petitioner, any record keeping errors that may have occurred resulted from "Caldwell's inattentiveness and not his own." *Ibid.* Sanderson agreed with petitioner that Caldwell, not petitioner, was responsible for preparing disciplinary write-ups for excessive tardiness or absenteeism. 3 R. 138.

Petitioner further testified that Chesnut regularly subjected him to verbal abuse on the job. 3 R. 26. In particular, petitioner recalled that, approximately two months before his termination, Chesnut approached him while he was trying to get a machine running and told him he was "too damn old to do [his] job." *Ibid.* On an earlier occasion, Chesnut commented that petitioner was "so old [he] must have come over on the Mayflower." *Ibid.* Oswalt corroborated the "obvious difference" in Chesnut's treatment of petitioner. *Id.* at 82. Oswalt recalled that, although he and Chesnut "had [their] differences," Chesnut's behavior toward him "was nothing compared to the way he treated [petitioner]." *Ibid.* Oswalt testified that Chesnut treated petitioner "as you would * * * treat * * * a child [with whom] you're angry." *Id.* at 83. According to Oswalt, Chesnut subjected petitioner to increased scrutiny, and "didn't treat [him] very well." *Ibid.*

At the close of the evidence, the district court denied respondent's motion for judgment as a matter of law and sent the case to the jury. 4 R. 354. The jury was instructed that, "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the discharge of plaintiff, then you shall find for the defendant." *Id.* at 368. The jury found respondent liable for willful discrimination based on age. The district court denied respondent's post-trial motion for judgment as a matter

of law or for a new trial, and respondent appealed. Pet. App. 4a.

2. The court of appeals reversed and rendered judgment for respondent. Pet. App. 1a-10a. On appeal, respondent did not dispute that petitioner had established a prima facie case of age discrimination, *id.* at 6a, and the court of appeals acknowledged that, based on the evidence at trial, "a reasonable jury could have found that [respondent's] explanation for its employment decisions was pretextual." *Id.* at 8a. The court ruled, however, that "whether [respondent] was forthright in its explanation for firing [petitioner] is not dispositive of a finding of liability under the ADEA" and went on to consider "as an essential final step * * * whether [petitioner] presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.*

In that inquiry, the court discounted the probative value of petitioner's evidence of respondent's discriminatory motivation, and concluded, in light of evidence favorable to respondent, that petitioner "did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA." Pet. App. 9a-10a. Although it acknowledged "the potentially damning nature of Chesnut's age-related comments," the court gave several reasons why it believed that those remarks were insufficient to show discriminatory motive in petitioner's discharge: The "comments were not made in the direct context of [petitioner's] termination," Chesnut was "just one of three individuals who recommended to Ms. Sanderson that [petitioner] be terminated," and petitioner produced no evidence that "any of the other decision makers were motivated by age." *Id.* at 9a. The court noted that two of the decision makers were over age 50,

and "20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60s." *Id.* at 9a-10a. Finally, the court remarked that all three Hinge Room supervisors—Caldwell and Oswalt as well as petitioner—were accused of inaccurate record keeping. Based on its review of the record, the court set aside the jury's verdict and rendered judgment for respondent. *Id.* at 10a.

SUMMARY OF ARGUMENT

Recognizing the difficult and sensitive nature of the question facing fact finders in cases of intentional employment discrimination, this Court has developed an evidentiary framework that enables employees to prove their cases through circumstantial evidence. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under that framework, an employee makes out a prima facie case of discrimination by presenting proof of actions by the employer that, if unexplained, more likely than not are based on factors prohibited by law. The prima facie case not only is sufficient to permit a trier of fact to find discrimination, but also gives rise to a mandatory presumption, which, if unrebutted, requires judgment for the employee. The employer can rebut the presumption by introducing evidence that, if believed, shows that the employer acted for a legitimate nondiscriminatory reason. The employee then has the opportunity to disprove the proffered explanation and demonstrate that it is a pretext for discrimination.

In *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993), this Court held that proof that the employer's asserted reasons for its actions were not the true reasons does not compel judgment as a matter of law for the employee, because the fact finder still must

determine that the true reason was discrimination. The court of appeals in this case held that such proof not only does not *compel* judgment for the employee, but does not *permit* judgment for the employee without additional evidence of discriminatory intent.

That holding is inconsistent with the clear statement in *Hicks* that "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination." 509 U.S. at 511 n.4. It is also inconsistent with the meaning of a prima facie case, the reasonable inferences that arise when an employer offers a discredited explanation for an action that has been challenged as discriminatory, and general evidentiary principles concerning the effect of presumptions and the inferences that fact finders are permitted to make.

In order to have his case presented to the jury, an employee ordinarily need not produce more than prima facie proof of discrimination plus evidence sufficient to support rejection of the explanation offered by the employer. If an employee has introduced such evidence, a court may not render judgment as a matter of law for the employer, except in the unusual circumstance in which the evidence otherwise conclusively establishes that the employer acted for a nondiscriminatory reason different from the one that the employer proffered.

In this case, petitioner presented prima facie proof of age discrimination and evidence that respondent offered a pretextual reason for his discharge. There was no evidence that would have precluded a reasonable jury from inferring from petitioner's proof that respondent fired petitioner because of his age. The evidence was therefore sufficient to sustain the jury's verdict that respondent violated the ADEA. In setting aside the verdict, the court of appeals improperly usurped

the jury's function of weighing the evidence, drawing reasonable inferences, and making the ultimate factual finding whether petitioner's discharge was unlawfully motivated by age.

ARGUMENT

THE COURT OF APPEALS ERRED IN AWARDING JUDGMENT AS A MATTER OF LAW TO RESPONDENT BECAUSE THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT THAT RESPONDENT FIRED PETITIONER IN VIOLATION OF THE ADEA

The Age Discrimination in Employment Act (ADEA or Act), makes it "unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The Act protects only workers who are "at least 40 years of age." 29 U.S.C. 631(a). The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace," and it is one component in "a wider statutory scheme to protect employees in the workplace nationwide." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (disability); the National Labor Relations Act, 29 U.S.C. 158(a) (union activities); and the Equal Pay Act of 1963, 29 U.S.C. 206(d) (sex)). Recent research indicates that age discrimination in employment continues to be a significant problem. See Marc Bendick, Jr. et al., *No Foot in the Door: An Experimental Study of Employment*

Discrimination Against Older Workers, 10(4) J. Aging & Soc. Pol'y 5 (1999).

In a case alleging unlawful disparate treatment in employment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). To prevail, the employee must show that his "protected trait actually played a role" in the employer's decisionmaking process "and had a determinative influence on the outcome." *Ibid.* This case concerns how much and what kind of evidence is sufficient for an employee to make that showing.

A. Prima Facie Proof Of Discrimination, Together With Evidence That The Employer Has Not Offered Its True Reason For An Adverse Employment Action, Is Usually Sufficient To Support A Jury Finding Of Discrimination

1. This Court has recognized that "the question facing triers of fact in discrimination cases is both sensitive and difficult," because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). To overcome the scarcity of direct proof of discriminatory motive, and to ensure that the "important national policy" embodied in the fair employment laws is achieved, *Aikens*, 460 U.S. at 716, the Court crafted, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973), "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). That evidentiary framework helps the factfinder to decide the "elusive factual question of intentional discrimination" when an employee uses circumstantial evidence to establish disparate treat-

ment. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981).[2]

To prove unlawful discrimination under the *McDonnell Douglas* framework, the employee "must carry the initial burden * * * of establishing a prima facie case," 411 U.S. at 802, by producing "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion," *Teamsters* v. *United States*, 431 U.S. 324, 358 (1977). For example, here petitioner established a prima facie case with proof that he was: (1) 57 years old (and thus within the statutorily protected age group); (2) qualified for his position as Hinge Room supervisor; (3) discharged; and (4) replaced, on three successive occasions over the next two years, by men in their thirties. See Pet. App. 5a-6a & n.11.

The prima facie case "creates a presumption that the employer unlawfully discriminated against the employee," and, if unrebutted, requires "judgment for the plaintiff because no issue of fact remains in the case." *Burdine*, 450 U.S. at 254. To rebut the presumption of

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[2] Every court of appeals "has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*" to ADEA claims. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 & n.2 (1996). Although this Court has "never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct," *id.*, the substantive "prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). Moreover, the two statutes share a common purpose. *McKennon*, 513 U.S. at 358. The rationale of *McDonnell Douglas* is thus equally applicable to claims under either statute. See *Hazen Paper*, 507 U.S. at 612 (suggesting that the *McDonnell Douglas* "proof framework [is] applicable to ADEA"). Moreover, as in *O'Connor*, the parties in this case agree that the *McDonnell Douglas* framework applies. See 517 U.S. at 311.

discrimination and raise "a genuine issue of fact as to whether it discriminated" against the employee, the employer "must clearly set forth, through the introduction of admissible evidence, the reasons" for the challenged action. *Id.* at 254-255. For example, here respondent introduced evidence that it fired petitioner because of alleged errors in recording the absences and tardiness of employees under his supervision. See Pet. App. 7a-8a.

Once the employer has produced evidence of a legitimate, nondiscriminatory explanation for its decision, the employee has the opportunity to show that the "proffered reasons for [the employer's] decision were not its true reasons," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187 (1989), but "were in fact a coverup for a * * * discriminatory decision," *McDonnell Douglas*, 411 U.S. at 805. The employee's proof "may take a variety of forms," and the employee is "not limited to presenting evidence of a certain type." *Patterson*, 491 U.S. at 187.

Evidence that the rule or criterion cited by the employer to explain its decision was applied in a discriminatory manner is especially relevant. *McDonnell Douglas*, 411 U.S. at 804. "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the employee] during his * * * term of employment," *ibid.*, including discriminatory remarks or instances of harassment or abuse by individuals responsible for the challenged employment decision. See *Patterson*, 491 U.S. at 188; *Aikens*, 460 U.S. at 713-714 n.2. Proof of the employer's "general policy and practice" with respect to employment of older individuals (in an ADEA case), including statistical evidence, "may be helpful" in demonstrating pretext, but statistics "may not be in and of themselves

controlling as to an individualized [employment] decision." *McDonnell Douglas*, 411 U.S. at 804-805 & n.19; see also *Furnco*, 438 U.S. at 579-580. Evidence challenging the factual accuracy of the proffered explanation is also probative of whether the explanation is a pretext for discrimination. *Burdine*, 450 U.S. at 259. Finally, the evidence supporting the employee's prima facie case "and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10.

2. In *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993), this Court held that proof that the employer's asserted reasons for its actions were not the true reasons does not *compel* judgment as a matter of law for the employee. The employee always retains the burden of persuasion on the ultimate fact of discrimination. *Ibid.* By proving that the employer did not act for the reasons proffered, the employee has not ruled out the possibility that the employer acted for another nondiscriminatory reason. See *id.* at 514-515, 523-524. The Court therefore held that the employee is not entitled to judgment in his favor unless the fact finder actually determines that the employer's true reason was discrimination. *Id.* at 514. At the same time, however, the Court observed that the fact finder *may* determine that the employer's true motive was discrimination based on the employee's prima facie case and his proof that the employer did not offer the true reasons for its action, without additional evidence of discriminatory intent.

Although the Court held that "*there must be a finding of discrimination*" for an employer to be held liable, the Court made clear that "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination." 509 U.S. at 511 n.4. Put another way, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and * * * '[n]o additional proof of discrimination is *required*.'" *Id.* at 511. That the Court meant what it said in *Hicks* is confirmed by its decision to remand the case, *id.* at 525, which would have been pointless unless the employee could still prevail, although he had only made out a prima facie case and showed that the reasons proffered by the employer were unworthy of credence.

The reasoning behind the Court's holding in *Hicks* supports that conclusion. As we explained at page 14, *supra*, the Court held that the fact finder's rejection of the employer's proffered explanation for its action could not compel judgment for the employee because there remained a possibility that the employer acted for an unstated but nondiscriminatory reason. The existence of that possibility prevents judgment as a matter of law for the employee because a reasonable jury might still find for the employer if it concludes that the employer in fact acted for a nondiscriminatory reason. But the existence of that possibility cannot compel judgment as a matter of law for the employer because a reasonable jury need not reach that conclusion.

a. The principle that an employee may prevail based on only the prima facie case and evidence supporting rejection of the employer's proffered reason follows from the quantum of evidence necessary to establish a prima facie case. As we have explained, to make out a prima facie case, an employee must present evidence that is itself sufficient to support an inference of discrimination. See p. 12, *supra*; *e.g.*, *O'Connor*, 517 U.S. at 312 ("the prima facie case requires '*evidence adequate to create an inference that an employment deci-*

sion was based on a[n] [illegal] discriminatory criterion'") (quoting *Teamsters*, 431 U.S. at 358); *Burdine*, 450 U.S. at 253 (employee must prove "circumstances which give rise to an inference of unlawful discrimination"); *Furnco*, 438 U.S. at 579-580 (prima facie case is "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations").

The prima facie case "eliminates the most common nondiscriminatory reasons" for the employer's action and raises an inference that discrimination is more likely than not the reason. *Burdine*, 450 U.S. at 254. That is because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as [age].

Furnco, 438 U.S. at 577.

Thus, by proving a prima facie case, an employee has provided evidence that, if unexplained, is sufficient for a jury to find discrimination. If the employer then comes forward with a nondiscriminatory explanation, but the employee produces evidence sufficient for a jury to reject that explanation, the persuasive force of the evidence supporting the prima facie case remains sufficiently strong to support a finding of discrimination.

That is true even though the mandatory presumption that this Court accorded the prima facie case in *McDonnell Douglas* "drops from the case" when the employer satisfies its burden to produce an explanation that, if believed, would allow a verdict in its favor. *Burdine*, 450 U.S. at 255 & n.10; *Hicks*, 509 U.S. at 510-511. As this Court has explained, the persuasive force of the evidence underlying the prima facie case is independent of its impact as a procedural device. See *Burdine*, 450 U.S. at 255 n.10. Thus, although "[a] satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence, * * * this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Ibid.*

That approach accords with the general treatment of presumptions under Federal Rule of Evidence 301, which informs the operation of the *McDonnell Douglas* presumptions. See *Burdine*, 450 U.S. 255 n.8; *Hicks*, 509 U.S. at 507, 511. "Under Rule 301, the effect of rebutting evidence does not completely dissipate the presumption. Unless no reasonable jury could disbelieve the rebuttal, the presumption still suffices to carry the issue to the jury. However, the jury is no longer instructed that it may presume the existence of the presumed fact, but only that it may infer it." 21 Charles A. Wright et al., *Federal Practice and Procedure* § 5122, at 572 (1977); see H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 5-6 (1974) ("If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it

may infer the existence of the presumed fact from proof of the basic facts.").[3]

b. When an employee provides sufficient evidence for the jury to reject the nondiscriminatory explanation offered by the employer, not only may the jury continue to infer discrimination from the prima facie proof, but it now has *additional* evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi* v. *Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). It is reasonable to conclude that an employer who gives a false explanation for conduct that has been challenged as discriminatory is dissembling to cover up the discrimination. See *Hicks*, 509 U.S. at 511, 517; 5 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 87.01, at 87-86 (1999) (Instruction 87-27).

That reasoning accords with the more general principle that a fact finder may infer consciousness of guilt when a party acts dishonestly about facts material to litigation. For example, a jury may (although it is not compelled to) infer that a criminal defendant who makes a false exculpatory statement believes he is guilty and thus probably is guilty. See *Wright* v. *West*, 505 U.S. 277, 296 (1992); 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 14.06, at 423-424 (1992); 1 Sand, *supra*, ¶ 6.05, at 6-37 (Instruction 6-11).[4] A similar inference is permitted in civil cases. See 2 John H. Wigmore, *Evidence in Trials at Common Law* § 278(2), at 133 (Chadbourn rev. 1979) ("a party's falsehood * * * in the preparation and presentation of his cause * * * is receivable against him as an indication of his consciousness that his case is a weak or unfounded one"). And a jury may infer that testimony or evidence is unfavorable if the party who has the power to produce it fails to do so. See *id.* § 291, at 228; *Graves* v. *United States*, 150 U.S. 118, 121 (1893).

Even if the jury does not believe that the employer is deliberately dissembling, the jury's rejection of the proffered reason will often reasonably strengthen the jury's belief that discrimination was the true motivation. As we have explained, the prima facie proof makes discrimination a likely explanation for the employer's action. See pp. 12, 15-16, *supra*. And the em-

[3] Not all courts and commentators agree with the view expressed in 21 Wright, *supra*, § 5122, at 572, that "rebutting evidence does not completely dissipate the presumption." Some contend that Rule 301 codifies the "bursting bubble" approach to presumptions, one of several competing approaches at common law. See 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 71, at 335 (2d ed. 1994). Under that approach, the presumption completely disappears once the opposing party introduces evidence that, if believed, disproves the presumed fact. Nonetheless, if "the natural probative force of the basic facts is sufficient to support a finding of the presumed fact," the trier of fact may still be instructed that it may infer the presumed fact. *Ibid.* See also Gregory P. Joseph et al., *Evidence in America: The Federal Rules in the States* ch. 8, at 5 (1987) ("Even if the presumption does disappear following rebuttal, nothing in Article III [of the Federal Rules of Evidence] precludes the trier of fact from drawing logical inferences from the evidence.").

[4] Fact finders are likewise permitted to infer consciousness of guilt from flight from the scene of a crime, 1 Devitt, *supra*, § 14.08, at 433; 1 Sand, *supra*, ¶ 6.05, at 6-29 (Instruction 6-9), use of a false name, *id.* at 6-35 (Instruction 6-10), and fabrication of an alibi, *id.* at 6-42 (Instruction 6-12).

ployer, in putting forth its defense, is likely to proffer as an alternative the nondiscriminatory explanation that best accords with the facts. As a result, the proffered explanation and discrimination will usually be the most plausible of the competing explanations for the employer's action. When the jury eliminates the proffered explanation as a possibility, discrimination will therefore normally be the most likely remaining potential explanation.

Thus, in order to have his case presented to the jury, an employee need not ordinarily produce more than prima facie proof of discrimination plus evidence sufficient to support rejection of the explanation offered by the employer. A contrary rule would effectively require the employee to produce either direct proof of discriminatory intent or a greater amount of circumstantial proof than is ordinarily required in civil litigation. And this Court has counseled that neither of those requirements would be appropriate. See *Teamsters*, 431 U.S. at 358 n.44; *Aikens*, 460 U.S. at 714 n.3, 717; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality opinion).

3. We do not suggest, however, that there can *never* be a case in which an employer will be entitled to judgment as a matter of law even though the employee has made out a prima facie case and produced sufficient evidence for a jury to reject the nondiscriminatory explanation offered by the employer. As the Court explained in *Hicks*, "the ultimate question [remains] discrimination *vel non*." 509 U.S. at 518. Thus, if the evidence conclusively establishes that the employer acted for an unstated, nondiscriminatory reason, then there is no question for the jury to resolve—even if the employer offered a different (and false) explanation for

its action, and the employee presented prima facie proof of discrimination.

That situation could arise if the employer's true nondiscriminatory motivation were revealed by the employee's efforts to disprove the employer's proffered explanation. See *EEOC: Enforcement Guidance on* St. Mary's Honor Center *v.* Hicks, 8 Fair Empl. Prac. Man. (BNA) 405:7175, 405:7179 (Apr. 12, 1994) ("Even before *Hicks*, if evidence relevant to a charge clearly showed that the respondent's articulated reasons for its action were untrue, but that a nondiscriminatory reason not articulated by the respondent was the true motive for the action, 'no cause' would be found.").

Assume, for example, that a 42 year-old employee who worked for an investment company alleges that the company fired him because of his age. The employee presents prima facie proof that he was qualified to do his job and that, after his discharge, his position was filled by someone who was 30 years old, but he produces no other evidence of age discrimination. The company responds that the employee was fired for insubordination after he refused to complete a work assignment. In his effort to show that he properly refused to complete the assignment, the employee shows that he had discovered that the project violated Securities and Exchange Commission (SEC) regulations, called that fact to the attention of the company, and threatened to alert the SEC, whereupon he was fired and instructed to keep his mouth shut if he ever wanted to work in the securities business again. Cf. *Rothmeier* v. *Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996). Based on that evidence, a court could

properly render judgment as a matter of law for the employer on the age discrimination claim.[5]

Such situations will be rare, however, because a court cannot conclude, as a matter of law, that the evidence establishes that the employer acted for an unstated, nondiscriminatory reason unless no reasonable jury could find otherwise. See Fed. R. Civ. P. 50; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citing *Brady* v. *Southern Ry.*, 320 U.S. 476, 479-480 (1943)). In reaching that conclusion, the court must consider the evidence in the light most favorable to the employee (as the non-moving party), and the court must give the employee the benefit of all justifiable inferences that may be drawn from the evidence. *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554 (1990); *Liberty Lobby*, 477 U.S. at 255; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). The court generally may not make credibility determinations or weigh the evidence. *Liberty Lobby*, 477 U.S. at 254; *Webb* v. *Illinois Cent. R.R.*, 352 U.S. 512, 515 (1957); *Brady*, 320 U.S. at 479.

Therefore, although the court must review all the evidence, it must disregard any evidence unfavorable to the employee's claim of discrimination if a reasonable jury could disbelieve that evidence. 9A Wright, *supra*, § 2529, at 299. For example, if there is conflicting testimony, the court generally must disregard the testimony favoring the employer. See *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57-60 (1949). And, if evidence is susceptible to two interpretations, the court must reject the

[5] The true nondiscriminatory motive need not be an illegal one. An employer might withhold its true motive not because it is unlawful but because it is embarrassing, such as nepotism or personal animosity, or in order to spare the employee's feelings.

interpretation favorable to the employer and instead accept the interpretation that supports the employee. See *Continental Ore Co.*, 370 U.S. at 701.[6]

Judgment as a matter of law is not appropriate if "reasonable minds could differ as to the import of the

[6] In *Wilkerson*, the Court stated that it "need look only to the evidence and reasonable inferences which tend to support" the non-moving party. 336 U.S. at 57. Some courts have understood that language to mean that a court must always disregard the moving party's evidence. 9A Wright, *supra*, § 2529, at 297-299. Read in context, however, the language in *Wilkerson* means only that a court should not give weight to evidence that is contradicted either directly or inferentially by the non-moving party's evidence. *Id.* at 300-301; Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 949 (1971) (cited in Fed. R. Civ. P. 50, Advisory Committee's Note (1991 Amendment)). Courts review all of the evidence in passing on a motion for summary judgment under Federal Rule of Civil Procedure 56, see, *e.g.*, *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970); and the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law under Rule 50, *Liberty Lobby*, 477 U.S. at 250. Courts likewise review all of the evidence in passing on motions for judgments of acquittal under Federal Rule of Criminal Procedure 29, *Lockhart* v. *Nelson*, 488 U.S. 33, 41-42 (1988); sufficiency-of-the-evidence challenges on direct and collateral review, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); and review of fact-finding by a district court under Federal Rule of Civil Procedure 52(a), *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985). For those reasons, and the reasons stated in the text preceding this note, the answer to the second question presented is that, in passing on a motion under Rule 50, a court must review all of the evidence in the light most favorable to the party against whom judgment is sought; and the answer to the third question presented is that the standard for granting judgment as a matter of law under Rule 50 is generally the same as the standard for granting summary judgment under Rule 56.

evidence." *Liberty Lobby*, 477 U.S. at 250. "The fundamental principle is that there must be a minimum of judicial interference with the jury." 9A *Wright*, *supra*, § 2524, at 261; Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 921 (1971) (cited in Fed. R. Civ. P. 50, Advisory Committee's Note (1991 Amendment)).

B. Petitioner's Prima Facie Case, Coupled With His Evidence That Respondent Did Not Offer The True Reason For Firing Him, Was Sufficient To Support The Jury's Verdict, Despite The Contrary Evidence On Which The Court Of Appeals Relied

In this case, the court of appeals improperly departed from the "fundamental principle" of minimal judicial interference with the jury. 9A Wright, *supra*, § 2524, at 261. Although petitioner presented prima facie proof of age discrimination and evidence sufficient for a reasonable jury to reject respondent's assertion that it fired petitioner because of poor record keeping, the court of appeals concluded that there was insufficient evidence for a reasonable jury to find, as the jury did here, that respondent fired petitioner because of his age. In so concluding, the court of appeals erroneously failed to consider much of petitioner's evidence, failed to view the evidence in the light most favorable to petitioner and to draw all reasonable inferences in his favor, and substituted its view of the weight of the evidence for the jury's reasonable view.

1. There is no dispute that petitioner presented prima facie proof of age discrimination by establishing that he was 57 years old, qualified for his position as Hinge Room supervisor, discharged, and replaced, on three successive occasions over the next two years, by men in their thirties. Pet. App. 5a-6a & n.11. That

evidence was "proof of actions taken by [respondent] from which [the jury could] infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco*, 438 U.S. at 579-580.

Respondent attempted to counter the inference of discrimination by introducing evidence that it fired petitioner because of errors in recording absences and tardiness of employees under his supervision, errors which respondent claimed cost the company money and exposed it to union grievances. Pet. App. 7a-8a. Petitioner, in turn, introduced a variety of evidence to discredit that explanation. Through cross-examination, he established that the company could not document the amount of any overpaid wages allegedly attributable to his purported errors, see *id.* at 8a; 4 R. 301, and had not received a grievance or complaint arising from them, 4 R. 267. Petitioner testified that he properly recorded the timely arrival of his employees and assigned extra work to any employee who was paid for arriving early or staying late. Pet. App. 8a. He showed that another supervisor, not he, was responsible for the only overpayment that was identified on the day that he was fired. 3 R. 17. And Sanderson agreed with petitioner that he was not responsible for preparing disciplinary write-ups for excessive tardiness or absenteeism. 3 R. 138.

Petitioner also testified that Powe Chesnut, who was married to the company president and was described by another witness as the "absolute power in" the company, 3 R. 80, subjected him to verbal abuse and made remarks indicative of age bias, including that petitioner was "too damn old to do [his] job," 3 R. 26. That treatment was corroborated by the independent testimony

of Joe Oswalt. 3 R. 82-83. Oswalt also testified that Chesnut subjected petitioner to heightened scrutiny and inferior treatment. 3. R. 83. Oswalt's testimony was confirmed by evidence concerning the 1993 efficiency study and consequent discipline of petitioner. Although petitioner and Oswalt had virtually identical productivity rates during that year, see 3 R. 163-167; 4 R. 226, Chesnut directed an efficiency study of only the line supervised by petitioner and recommended only petitioner for probation. Oswalt, who was in his early thirties, was neither studied nor disciplined. 3 R. 166-167; 4 R. 228-229. The court of appeals concluded that, "[b]ased on this evidence, * * * a reasonable jury could have found that [respondent's] explanation for its employment decisions was pretextual." Pet. App. 8a.

That finding, coupled with petitioner's prima facie proof, was also sufficient for the jury "to infer the ultimate fact of intentional discrimination." *Hicks*, 509 U.S. at 511; see also pp. 11-20, *supra*. Indeed, after being properly instructed to find for respondent if petitioner "fail[ed] to prove age was a determinative or motivating factor in [his] discharge," 4 R. 368, the jury returned a verdict for petitioner. Pet App. 4a. The district court denied respondent's motions for judgment as a matter of law. The court of appeals nonetheless held that petitioner "did not introduce sufficient evidence of age discrimination to support the jury's finding of liability." *Id.* at 10a.

2. In rejecting the jury's verdict, the court of appeals improperly invaded the province of the jury. The court did not give sufficient weight to petitioner's prima facie proof and evidence of pretext, and it failed to draw all reasonable inferences in petitioner's favor. Moreover, the countervailing evidence on which the court relied would not have precluded a reasonable jury

from inferring discrimination from petitioner's evidence.

In considering whether there was sufficient evidence of discrimination to support the verdict, the court of appeals erroneously failed to take into account petitioner's prima facie proof, as well as his evidence of pretext, other than Powe Chesnut's age-related comments and the evidence that petitioner was treated less favorably than younger employees. See Pet. App. 8a-10a. As we have explained, the jury was entitled to consider all of that evidence in deciding whether to draw the ultimate inference of discrimination. See pp. 16-20, *supra*.

Moreover, in evaluating the evidence that it did consider, the court of appeals impermissibly substituted its view of the weight of the evidence for the jury's view and failed to draw all reasonable inferences in petitioner's favor. In apparent response to petitioner's evidence that he was singled out for harsher treatment than younger supervisors, the court noted that all of the Hinge Room supervisors—including Oswalt, who was in his thirties—were accused of inaccurate record keeping. See Pet. App. 9a. That fact, however, would not preclude a reasonable jury from inferring age-based animus based on the other evidence of differential treatment. That is particularly so because Oswalt had left his job voluntarily before the audit that revealed the alleged inaccuracies was even conducted, and the jury could have disbelieved Chesnut's testimony that he would have been fired if he had not left voluntarily.

The court of appeals' treatment of Chesnut's age-related comments was particularly improper. The court acknowledged the "potentially damning nature" of the comments, but discounted them because they "were not made in the direct context of [petitioner's] termination"

and Chesnut was "just one of three individuals who recommended to Ms. Sanderson that [petitioner] be terminated." Pet. App. 9a. A reasonable jury, however, could have viewed those remarks as a strong indication that petitioner's termination was based on age discrimination. The comments were directed specifically to petitioner and singled him out based on his age. 3 R. 26. At least one of them was targeted at his job performance and was made just two months before his termination. *Ibid.* And the person who made the comments was said to be "in absolute power" at the company, 3 R. 80, had previously recommended disciplinary action against petitioner, 4 R. 237, ordered the audit that led to petitioner's discharge, Pet. App. 3a, and was married to the person with the ultimate authority to fire petitioner, *id.* at 3a n.1.

Finally, the court of appeals erred in relying on the fact that two of the people who were involved in the decision to fire petitioner and several other of respondent's managers were over the age of 50. See Pet. App. 9a-10a. To the extent that evidence was contradicted by petitioner, see 4 R. 333, the court should have disregarded it. Even if the court properly considered the evidence, the court erred in drawing an inference unfavorable to petitioner from it, because a reasonable jury was not compelled to do so. For example, the jury reasonably could have determined that Chesnut's influence at the company was so strong that the other "decision makers" simply ratified his age-based decision to fire petitioner. Cf. *Anderson* v. *Bessemer City*, 470 U.S. 564, 579-580 (1985) (upholding finding of discrimination based on evidence that two of five members of selection committee had discriminatory animus).

Even if a reasonable jury necessarily would have concluded that the age of the other managers made it

somewhat less likely that respondent discriminated against petitioner, a reasonable jury would not necessarily have found that conclusion sufficient to overcome the evidence pointing to discrimination. The fact that "at least two of the decision makers were themselves over the age of 50" (Pet. App. 9a) does not conclusively establish that they did not discriminate against petitioner based on his age. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[N]othing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."). Similarly, although proof that respondent retained other employees in their 50s and 60s in management positions, see Pet. App. 10a, "is not wholly irrelevant on the issue of intent, * * * such proof neither was nor could have been sufficient to *conclusively* demonstrate that [respondent's] actions were not discriminatorily motivated." *Furnco*, 483 U.S. at 580. Because the evidence did not conclusively establish that respondent fired petitioner for a nondiscriminatory reason, respondent was not entitled to judgment as a matter of law.

This Court has repeatedly counseled that neither "trial courts [nor] reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716; *Hicks*, 509 U.S. at 524. "Conventional rules of civil litigation generally apply in [discrimination] cases." *Price Waterhouse*, 490 U.S. at 253 (plurality opinion). "[O]ne of these rules is that

parties to civil litigation need only prove their case by a preponderance of the evidence." *Ibid.* Another is that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, 477 U.S. at 255. "If reasonable minds could differ as to the import of the evidence," the jury, not the court, must render judgment. *Id.* at 250. The court of appeals disregarded those principles and usurped the jury's role by rendering judgment for respondent in this case.

CONCLUSION

The judgment of the court of appeals should be reversed, and the jury verdict for petitioner should be reinstated.

Respectfully submitted.

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